IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LARRY CUSTER JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11944 Trial Court No. 3AN-12-9613 CR MEMORANDUM OPINION No. 6384 — September 21, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Elizabeth D. Friedman, Assistant Public Advocate, Appeals and Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Jason Gist, Assistant District Attorney, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Following a jury trial, Larry Custer Jr. was convicted of second-degree sexual assault[1] for digitally penetrating a woman while she was incapacitated. At sentencing, Custer argued that his conduct was "among the least serious conduct included in the definition of the offense" — a mitigating factor under AS 12.55.155(d)(9) that would have permitted the court to sentence him below the applicable presumptive range. The trial court rejected the proposed mitigator and sentenced Custer to 15 years with 3 years suspended (12 years to serve), a sentence within the applicable presumptive range of 10-25 years.[2]

Custer appeals the denial of the mitigator. For the reasons explained here, we affirm the trial court's ruling.

Custer also separately appeals a special condition of his probation prohibiting him from associating with people who use or manufacture homebrew and from entering or remaining in a place where homebrew is used, manufactured, or sold. Custer contends that this condition of probation infringes on his constitutional right of association. For the reasons explained here, we conclude that a remand is required to determine the intended meaning and scope of this special probation condition.

Facts and prior proceedings

In September 2012, Larry Custer Jr. was visiting Anchorage and temporarily staying with his niece, Lulu Foxglove.

On the night of the incident, Custer was drinking with Foxglove's father and another male family member. Foxglove and her neighbor, P.W., were also drinking

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[1] AS 12.41.420(a)(3).

[2] At sentencing, Custer faced a presumptive sentence of 10 to 25 years in light of his prior felony conviction. *See* AS 12.55.125(i)(3)(B).

that night. Foxglove did not want the men drinking at her apartment and, for most of the evening, the men were elsewhere while the women stayed at Foxglove's apartment.

P.W. continued to drink into the night and ultimately became very drunk, slurring her words and staggering. Around 5:00 a.m., P.W. passed out on Foxglove's couch. Foxglove covered her with a blanket and went to bed. Foxglove was awakened a short time later by the sound of P.W. coughing and moaning from the living room. Concerned that P.W. was choking on vomit, Foxglove went to check on her. Foxglove found P.W. lying on the couch with her shorts off and her underwear wrapped around her lower leg. Custer was crouched beside her with his hand under the blanket. Foxglove saw Custer's hand moving under the blanket between P.W.'s legs, which made her think that Custer was digitally penetrating P.W.

Foxglove told Custer to stop what he was doing, and he jumped up. P.W. did not move. Foxglove then went back to her room and called 911.

When the police arrived, the police tried to wake P.W. by shaking her, poking her, applying pressure to her body, and calling her name. But these attempts were unsuccessful.

Eventually, Foxglove was able to wake P.W. up. When P.W. woke up, she appeared confused. The officers observed that she was very intoxicated. After Foxglove explained to P.W. why the police were there, she started crying and became emotional.

Custer was taken into custody at the scene. Subsequent DNA testing revealed that the majority of DNA underneath Custer's fingernails on his left hand belonged to P.W.

Custer was indicted on one count of sexual assault in the second degree[3] and one count of attempted sexual assault in the second degree.[4]

P.W. died shortly before trial and was not available to testify. Instead, the State relied on Foxglove's testimony, the DNA results, and the testimony of the responding officers.

Custer testified in his own defense at trial. In his testimony, Custer admitted that he had digitally penetrated P.W., but he claimed that she was not too incapacitated to consent to the digital penetration and she had consented to the penetration.

The jury convicted Custer of second-degree sexual assault for engaging in digital penetration with a victim who was incapacitated and incapable of consenting.

Custer's proposed statutory mitigator that his conduct was "among the least serious included within the definition of the offense"

At sentencing, Custer proposed the statutory mitigating factor that his conduct was "among the least serious conduct included in the definition of the offense."[5] Custer argued that his conduct qualified as "among the least serious" because there was evidence at trial (*i.e.*, Custer's own testimony) that P.W. appeared to be conscious and consenting. Custer also argued that he did not realize that P.W. was incapacitated because of his own intoxication.

The trial judge rejected Custer's characterization of the events, finding that Custer's conduct fit "squarely within the definition of the offense" and did not qualify

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[3] AS 11.41.420(a)(3)(B)-(C).

[4] AS 11.31.100(a).

[5] AS 12.55.155(d)(9).

as "among the least serious." The judge remarked, in particular, on the extreme intoxication and incapacitation of the victim and the efforts it took to rouse her, finding that she was "as incapacitated as a drunk woman could be."

On appeal, Custer asserts that the trial judge erred in rejecting his proposed mitigating factor. But the argument that Custer raises on appeal in favor of the proposed mitigating factor is different than the argument he presented to the trial judge. Custer now claims that his conduct in digitally penetrating P.W. qualified as "among the least serious conduct included in the definition of the offense" as a matter of law. Specifically, Custer claims that digital penetration is inherently less serious than penile or oral penetration because it does not carry the same risks of sexually transmitted diseases and pregnancy.

As Custer acknowledges, we rejected a similar claim in *Lepley v. State*.[6] In *Lepley*, the defendant claimed that fellatio, by its nature, was inherently a "less serious" form of sexual misconduct than digital or penile penetration. We rejected this argument, concluding that "when the legislature has defined several methods of committing the same crime, each method is deemed of equal seriousness with the others."[7]

Custer contends that we should overrule *Lepley* and disavow its underlying reasoning. But we "will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and

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[6] 807 P.2d 1095 (Alaska App. 1991).

[7] *Id.* at 1097 (internal citation omitted); *see also Benboe v. State*, 698 P.2d 1230, 1232 n.4 (Alaska App. 1985) ("There is [] no basis upon which to conclude that one type of penetration should be deemed automatically more serious or less serious than another.").

that more good than harm would result from a departure from precedent."[8] We see no reason to overrule *Lepley* in this case.

Nor do we agree with Custer that the Alaska Supreme Court's decision in *Michael v. State*[9] dictates a contrary result.

In *Michael*, the Alaska Supreme Court clarified that it is a question of law whether a given set of facts establishes one of the aggravating or mitigating factors listed in AS 12.55.155(c)-(d).[10] An appellate court therefore employs the *de novo* standard of review when we assess whether, under the facts found by the sentencing court, the sentencing court ruled correctly on a proposed aggravator or mitigator.[11] But we are still required to defer to the sentencing court's findings of fact unless those findings are shown to be clearly erroneous.[12]

In the superior court, Custer argued that his conduct qualified as "among the least serious" because he claimed that he mistakenly believed, in his intoxicated state, that P.W. *was* consenting to the sexual penetration. But the trial court rejected this claim, finding that P.W. was as "incapacitated as a drunk woman could be" and that Custer's conduct fell "squarely within the definition of the offense."

Having independently reviewed the record, we conclude that the judge's findings are well-supported by the record, and we agree with the judge's conclusion that

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[8] *State, Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003).

[9] 115 P.3d 517 (Alaska 2005).

[10] *Id.* at 519-20.

[11] *Id.*

[12] *Id.* at 519.

Custer's conduct did not qualify as among the least serious conduct included within the definition of second-degree sexual assault.

Accordingly, we affirm the superior court's rejection of Custer's proposed mitigator.

Custer's challenge to special probation condition 7

At Custer's sentencing, the superior court adopted the general and special conditions of probation recommended in the presentence report. Custer did not object to any of these conditions, and the court did not make any findings regarding them. Now, on appeal, Custer argues that special probation condition 7 is overbroad and unnecessarily infringes on his constitutional right of association.

Special probation condition 7 provides:

> The probationer shall not associate with individuals who use or manufacture homebrew nor enter or remain in places where homebrew is used, manufactured or sold.

Custer asserts that he is related to most of the people in his village and that homebrewing is common there. He therefore claims that it would be difficult, if not impossible, for him to live in his village and to associate with his family members if he was required to avoid anyone who has used or manufactured homebrew, and to avoid all homes where homebrew has been consumed.

Because this argument was not raised below, the truth of Custer's assertions regarding his village are unknown. We note that the special condition, as currently written, is ambiguous and could be understood as simply restricting Custer from associating with persons *presently* using or manufacturing homebrew and to avoid places where homebrew is *presently* being used, manufactured, or sold.

On the other hand, the probation condition could be interpreted broadly to prohibit all interactions with persons who have consumed or manufactured homebrew in the past and require Custer to avoid all places where homebrew has been previously consumed. If Custer's claims about the prevalence of homebrewing in his village are accurate, then we would agree that the condition is improper. The condition must be "narrowly tailored to avoid unnecessary interference with [Custer's] family relationships," and the sentencing court must "affirmatively consider, and [have] good reason for rejecting, any less restrictive alternatives."[13]

Because we cannot determine the intended meaning or scope of this special probation condition, we remand this case to the superior court for reconsideration of this condition. We note that appellate courts in other jurisdictions have similarly relied on remand proceedings to address the problems created by an "unobjected-to" probation condition that is potentially unconstitutional.[14] We agree that, in most instances, this is a common-sense solution that gives the State an opportunity to clarify the intended scope and meaning of the probation condition while also providing the trial court with an opportunity to narrow the condition appropriately, if necessary.

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[13] *Simants v. State*, 329 P.3d 1033, 1038-39 (Alaska App. 2013) (quoting *Diorec v. State*, 295 P.3d 409, 414 (Alaska App. 2013)).

[14] *See, e.g.*, *United States v. Martinez-Torres*, 795 F.3d 1233, 1236 (10th Cir. 2015); *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014); *United States v. Dotson*, 715 F.3d 576, 586 (6th Cir. 2013); *Pollock v. Bryson*, 450 So. 2d 1183, 1184-85 n.2 (Fla. App. 1984); *State v. Cornell*, 103 A.3d 469, 474 (Vt. 2014).

Conclusion

We REMAND Custer's case to the superior court for further proceedings consistent with this opinion regarding special probation condition 7. In all other respects we AFFIRM Custer's sentence.